Supreme Court, U.S.
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No. 99-1689

In The

Supreme Court of the United States

GARY R. LEBLANC,

Petitioner,

v.

RICHARD P. SALEM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there exists a conflict in federal law in a case clearly controlled by this Court's holding in *Mosser v. Darrow*, 341 U.S. 267 (1951), that a bankruptcy trustee, acting with the explicit approval of the bankruptcy court, is immune from suit in the absence of evidence of bad faith?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, bankruptcy trustee Richard P. Salem, requests this Honorable Court to deny the Petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the First Circuit. Petitioner's arguments were thoroughly considered and rejected by the First Circuit and do not warrant further review by the Court. Petitioner fails to articulate any legitimate reason for the issuance of a writ of certiorari. In addition to its misinterpretation of applicable law, the Petition contains numerous misstatements of the factual record and unsupported averments which go well beyond zealous advocacy. In accordance with Supreme Court Rule 15.2, Respondent is compelled to address the many errors and mischaracterizations contained in the Petition.

STATEMENT OF THE CASE

Respondent Richard P. Salem ("Salem") is the duly-appointed Chapter 7 trustee of the Estate of Mailman Steam Carpet Cleaning Corp. Petitioner Gary R. LeBlanc ("LeBlanc") is a creditor of the Estate. LeBlanc brought an adversary proceeding in the bankruptcy court alleging that Salem was negligent and had breached his fiduciary duty as trustee in abandoning an asset of the Estate. The abandonment was ordered by the bankruptcy court after notice and a hearing at which all interested parties (including Petitioner) were allowed to participate.

The bankruptcy court dismissed the adversary proceeding, holding that Respondent could not be held

personally liable because he had acted pursuant to a court order and therefore, his actions were entitled to protection under the doctrine of derived judicial immunity. Dismissal of the adversary proceeding was affirmed, on essentially the same grounds, by the Massachusetts federal district court and by the First Circuit Court of Appeal. The Petition to this Court is no more or less than a re-hash of arguments previously made by Petitioner and rejected below. The Petitioner has failed to articulate any legitimate reason for the issuance of a writ of certiorari. The Petition should be denied.

MISSTATEMENTS CONTAINED IN THE PETITION

At each level of appeal, the Petitioner, a pro se attorney, has exaggerated the evidence of record and mischaracterized the nature of the underlying proceedings. The Petition is replete with factual misstatements, unsupported averments and incorrect statements of the law. Pursuant to Supreme Court Rule 15.2, Respondent will address and correct *seriatim* the numerous misstatements contained in the Petition.

MISSTATEMENT #1

"Said Bankruptcy Court Order was a contingent settlement which required the Trustee Salem to review the 'facts of the sale' of commercial property, attached by a judgment awarded to the Mailman Estate, and after review, the trustee 'may move for revocation of the settlement.' "

(Petition for a Writ of Certiorari (hereinafter, "Petition") at p. 2)

CORRECTION

Petitioner is apparently referring to an order of the bankruptcy court issued on the Trustee's Motion to Approve Settlement of the Estate's claim against Alfred Lizotte. The Order, dated October 19, 1995, and misquoted by Petitioner, was entered after oral hearing (over Petitioner's objection). The actual Order provided, in full, as follows:

> "Settlement approved. The approval is conditional. If the gas station is sold within two years from today, the Trustee may move for revocation of this approval. Depending on the facts of the sale, the Court will then either confirm or revoke its approval."[1]

Petitioner's statements that the Order "required" the Respondent to review the facts of the sale is patently untrue.[2] To the contrary, the bankruptcy court *approved* the settlement, although the order *permitted* the Respondent to later challenge the settlement, *if* the Respondent deemed it appropriate.

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[1] The "asset" which Respondent abandoned (allegedly improperly) is derived from this court order: it is the right – but not the obligation – to move for revocation of the Court's approval of the settlement with Lizotte.

[2] Petitioner's "Question Presented" suffers from this same infirmity, i.e., that the bankruptcy court *ordered* the Respondent to investigate the Petitioner's allegations of fraud.

MISSTATEMENT #2

" . . . LeBlanc pleaded and demanded that Trustee Salem review the 'facts of the sale' and provide a complete accounting of the sale assets as required by the court order and trustee's fiduciary duty."

(Petition at p. 2)

CORRECTION

There is no evidence that Petitioner "pleaded and demanded" the Respondent to do anything. While such allegations, even if true, would have no legal effect on the merits of this claim, Petitioner has, once again, improperly inserted into the record an unsupported reconstruction of actual events. Moreover, as discussed *supra*, the bankruptcy court's order did *not* require the Respondent to provide an accounting of the sale assets, or to investigate the Petitioner's allegations of fraud.

MISSTATEMENT #3

"It is undisputed that despite LeBlanc's allegations of fraud, Trustee Salem failed and/or refused to provide an accounting or even investigate the sale."

(Petition at p. 3)

CORRECTION

As the Petitioner is well aware, the pleadings filed in the bankruptcy court and the transcripts of the numerous hearings held over the course of 2½ years (included in the Record Appendix submitted by Petitioner to the First Circuit) belie Petitioner's statement that Respondent "failed and/or refused to provide an accounting or even

investigate the sale." The evidence of record establishes that: (i) prior to moving the bankruptcy court for an order approving the settlement with Lizotte, Respondent reviewed the proposed settlement, determined it was fair and reasonable, noticed interested parties and creditors of his findings, and then presented his conclusions to the bankruptcy court at a duly-noticed hearing, attended by Petitioner; (ii) at a subsequent hearing, Respondent informed the bankruptcy court that he had no knowledge of facts with which to challenge the settlement; (iii) at Petitioner's request, the bankruptcy court permitted Petitioner to conduct discovery for the purpose of substantiating the allegations of fraud against Lizotte; (iv) after two years, when no evidence of fraud was forthcoming, Respondent sought to bring the settlement with Lizotte to conclusion; and (v) after a duly-noticed hearing, at which the Petitioner appeared in opposition, the bankruptcy court issued an order approving Respondent's request that the right to seek revocation of the settlement with Lizotte be abandoned.

MISSTATEMENT #4

"Creditor LeBlanc further demanded that Trustee Salem move to escrow the funds upon the sale of the subject property. . . . Again, it is undisputed that Trustee Salem failed and/or refused to do so. Within weeks of the sale of the subject property, the proceeds of the sale were distributed."

(Petition at p. 3)

CORRECTION

Petitioner's statement is directly contrary to the evidence of record. In fact, the Respondent did move the bankruptcy court for an order that the proceeds of the sale be placed in escrow, but the request was denied by the court.

MISSTATEMENT #5

"In March, 1998, over two (2) years subsequent to the sale of the subject property, Trustee Salem moved the Court to abandon the contingent claim and accept a reduced compromise settlement."

(Petition at p. 3)

CORRECTION

Whether by design or carelessness, the Petition misrepresents and misstates the nature of the relief requested in the bankruptcy court in several important respects.

First, the motion filed by Respondent in March 1998 sought approval to abandon the right to seek revocation of the Lizotte settlement. The purpose of the motion was to conclude the settlement which had been approved 2½ years earlier. Second, Petitioner neglects disclosing that the bankruptcy court allowed his request to conduct discovery to substantiate his claim of fraud against Lizotte and that Petitioner was unable to uncover any such evidence. Third, Respondent served notice of the motion for abandonment on all creditors of the Estate, including Petitioner; and the Petitioner had an opportunity to, and did, oppose abandonment at a bankruptcy court hearing. Fourth, Petitioner's statement that the Respondent

moved the court to "accept a reduced compromise settlement" with Lizotte is a blatant mischaracterization of actual events: in fact, the Respondent moved to abandon the right to seek revocation of the settlement on terms *previously approved* by the bankruptcy court.

MISSTATEMENT #6

"The Court, without a full hearing into the 'facts of the sale' or creditor's allegations of fraud, relied on Trustee, in his fiduciary capacity and allowed Trustee's motions, compromised the settlement and abandoned the claim."

(Petition at p. 3)

CORRECTION

As indicated *supra*, the bankruptcy court approved abandonment of the right to seek revocation of the settlement with Lizotte after several years of fruitless efforts by Petitioner to substantiate his claim that Lizotte had committed a fraud on the court. Likewise, the Respondent never obtained sufficient evidence of fraud to challenge the previously approved settlement. All of this information was presented to, and considered by the Court during a hearing held on April 15, 1998, at which the Petitioner argued against abandonment. At the conclusion of the hearing, the bankruptcy court approved the Respondent's motion for abandonment over the Petitioner's objection.

MISSTATEMENT #7

"Trustee Salem's failure in 1996 to investigate Creditor LeBlanc's allegations of real estate fraud in light of the court's order to review 'the facts of the sale,' and further

failure to provide even a basic accounting of the assets allegedly sold was willful intentional negligence." [sic]

(Petition at p. 4)

CORRECTION

As set forth *supra*, the Respondent was never ordered by the bankruptcy court to "review the facts of the sale." However, based upon the investigation which he did conduct, the Respondent found insufficient evidence of fraud to seek revocation of the Lizotte settlement. Despite Petitioner's attempt to recast the allegations of the adversary complaint at this late stage, at most, Petitioner's claim against the Respondent is for gross negligence. *See In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 6 n.3 (1st Cir. 1999). As the First Circuit found however, the conclusory allegation of "willful and deliberate" misconduct has no evidentiary support. *Id.*

MISSTATEMENT #8

"Although it is true that Creditor LeBlanc stopped short of accusing Trustee Salem of being a knowing participant in the fraud, it was only because LeBlanc feared further reprisals by the trustee . . . [T]he Complaint itself is a resounding allegation of bad faith by Trustee Salem."

(Petition at p. 5-6)

CORRECTION

Petitioner's attempt to raise the specter of fraud – a claim which was never asserted in the adversary complaint and which, as the First Circuit found, is entirely unsubstantiated – is a blatant attempt to recast the claims

actually asserted below and forms no part of the record on appeal. As Petitioner admits, Petitioner has never alleged that Respondent participated in a fraud; and Petitioner's implication that a fraud claim could have been asserted is empty rhetoric. Likewise, Petitioner's reasoning for why certain claims were or were not asserted has no relevance or evidentiary support, and ought not be considered by the Court.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that a writ of certiorari "will be granted only for compelling reasons." Petitioner has failed to offer any special or important reasons for this Honorable Court to review the well-reasoned decision of the First Circuit. The disposition below is in full accord with controlling law of this Court. Petitioner's challenge consists largely of disputed factual findings. There is no compelling reason for the grant of certiorari.

I. The Decision of the First Circuit Is Consistent with the Law of this Court and with Precedent of the Circuit Courts of Appeal

The premise of Petitioner's challenge is that Respondent should not obtain derived judicial immunity from the claim of breach of fiduciary duty in allegedly failing to ascertain that Lizotte had committed a fraud on the bankruptcy court. The evidence of fraud was so clear, Petitioner asserts, that Respondent's refusal to request the bankruptcy court to revoke its prior approval of the

settlement constitutes negligence (or gross negligence) for which Respondent should be held liable. However, this is the same (largely factual) argument which was presented below and rejected at each level of review. It need not be revisited by this Court.

The seminal decision on the issue of a trustee's fiduciary duties to creditors of a bankruptcy estate is *Mosser v. Darrow*, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 (1951). In *Mosser*, the Supreme Court held that a bankruptcy trustee may avoid personal liability by seeking instructions from the court upon difficult questions of judgment, and by providing notice of the requested action to creditors and other interested parties. *Id.*, 341 U.S. at 274. Following *Mosser*, every circuit court of appeal which has addressed the issue has held that, as long as there is full and frank disclosure to all interested parties, "a trustee acting with the explicit approval of a bankruptcy court is entitled to absolute immunity." *In re Mailman, supra*, 196 F.3d at 8.

In this case, as found by the First Circuit, Respondent "wisely" sought court approval to abandon the right to move for revocation of the Lizotte settlement and provided notice to all interested parties. After a hearing in which Petitioner presented his objections, the Court approved the abandonment. In the absence of bad faith – of which there is no evidence (nor even an allegation) – Respondent is entitled to "the cloak of derived judicial immunity" from Petitioner's claims. *Id.*

The First Circuit's decision is in full accord with *Mosser* and with all of the circuit courts of appeal which have addressed the issue. *See Yadkin Valley Bank & Trust*

Co. v. McGee, 819 F.2d 74 (4th Cir. 1987); *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096 (9th Cir. 1986); *Boullion v. McClanahan*, 639 F.2d 213 (5th Cir. 1981). Because there is no conflict in the application of federal law, the Petition should be denied.

II. This Case Does Not Present an Important but Undecided Question of Federal Law

In the Court's discretion, certiorari may be granted when the Petition presents an important question of federal law which has not been, but should be settled by this Court, or, when the circuit court of appeal has decided an important federal question in a way which conflicts with the law of this Court. Sup. Ct. R. 10(c). Notably, the Petition fails to identify any undecided, or conflicting question of federal law – precisely because none exists in this case.

Examples of important, undecided federal questions accepted for review by the Supreme Court include matters of constitutional law, *see e.g., Dickerson v. U.S.*, 120 S. Ct. 578 (Mem.), 145 L. Ed. 2d 481, 68 USLW 3361, *cert. granted* (U.S. December 6, 1999) (petition for certiorari granted to review whether Miranda warning is constitutionally based); or, the accommodation of state and federal interests under the Constitution, *see e.g., Kosydar v. National Cash Register Co.*, 417 U.S. 62, 94 S. Ct. 2108, 40 L. Ed. 2d 660 (1974); or, the interpretation of federal treaty obligations, *see e.g., Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961).

The decision by the First Circuit here, that a bankruptcy trustee acting with the explicit approval of the

bankruptcy court, is immune from suit in the absence of evidence of bad faith, presents neither an important nor an undecided question of federal law. As set forth above, the First Circuit decision is in accord with the rule of *Mosser* and with all of the circuit courts of appeal. While the outcome of this case is significant to the litigants herein, no constitutional or federal question of wider import is presented by the Petition.

III. This Is Not the Rare Case in which the Court Should Consider Review of Allegedly Erroneous Factual Findings or the Alleged Misapplication of a Properly Stated Rule of Law

In "rare" instances, the Court may grant a petition for certiorari in order to correct erroneous factual findings or the misapplication of a properly stated rule of law. *See* Sup. Ct. R. 10(c). This case does *not* present the rare circumstance which merits such review and Petitioner has failed to articulate any rationale for the Court to intervene to "correct" the First Circuit's decision.

In reaching its conclusion that the Respondent was entitled to derived judicial immunity, the First Circuit undertook a *de novo* review of the merits of the claim. 196 F.3d at 8. As set forth in Section I above, the First Circuit correctly held that the Respondent followed the course dictated by *Mosser* and therefore was immune from Petitioner's claims. Even assuming the First Circuit misapplied well-settled legal principles to the facts, such an error would not warrant review by this Court.

The factual findings and legal conclusions in this case have been carefully considered by the bankruptcy court, the Massachusetts federal district court and the First Circuit Court of Appeals. At each level of review, the courts below reached a consistent result: that the Respondent is immune from the Petitioner's claims. There are no compelling reasons for this Honorable Court to undertake further review.

CONCLUSION

For the reasons set forth above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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